In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 300

JAMES TOOAHIMPAH TATE, VILA TOOAHNIPPAH (PADDLETY), JULIA TOOAHNIPPAH (GOOMBI), and JAMES TOOAHIMPAH TATE, the duly qualified and acting Administrator of the Estate of Frankie Lee Tooanippah, deceased,
Petitioners,

VERSUS

WALTER J. HICKEL, Secretary of the Interior for the United States, and DORITA HIGH HORSE,
Respondents.

ANSWER BRIEF OF DORITA HIGH HORSE, RESPONDENT

HOUSTON BUS HILL
1376 First National Building
Oklahoma City, Oklahoma 73102
Counsel for Respondent, Dorita High Horse

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UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. CE 5-0080

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CITATIONS TO OPINIONS BELOW

The opinion of the District Court for the Western District of Oklahoma (App. 27-37) is reported at 277 F.Supp. 464 (1967).

The opinion of the Court of Appeals for the Tenth Circuit vacating judgment of the trial court with direction to dismiss the action for want of jurisdiction is reported at 407 F.2d 394 (App. 44-47).*

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*A joint appendix containing the pleadings and orders of the Court has been prepared in accordance with Rule 36 for use in No. 300 and references to that appendix will be cited as App. .....

QUESTIONS PRESENTED FOR REVIEW

1. Is a decision of the Secretary of Interior approving or disapproving a will of an Indian made pursuant to 25 U.S.C. Sec. 373, subject to judicial review under 5 U.S.C. Sec. 702 and 28 U.S.C. Sec. 1361. Or, to the contrary, does 5 U.S.C. Sec. 701(a) make such decision immune to judicial review?

2. Even if the decision is subject to review, is the scope of judicial review limited to determining whether or not the Secretary has remained within the scope of the authority conferred upon him?

3. If the scope of the review is larger, was the disapproval of the will under the facts of this case capricious and arbitrary, or did it have some rational basis?

STATUTES INVOLVED

Title 5 U.S.C. Sec. 701(a):

"Application

"This chapter applies according to the provisions thereof, except to the extent that . . .

(1) Statutes preclude judicial review; or

(2) Agency action is committed to agency discretion by law."

Title 5 U.S.C. § 702:

"Right of Review

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Title 28 U.S.C. § 1361:

"Action to compel an officer of the United States to perform his duty

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Title 25 U.S.C. § 372:

"Ascertainment of heirs of deceased allottees; settlement of estates; sale of lands; deposit of Indian moneys

"When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold: * * *"

Title 25 U.S.C. § 373:

"Disposal by will of allotments held under trust

"Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period,

and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless or until it shall have been approved by the Secretary of the Interior: *Provided further,* That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: * * *."

Title 25 U.S.C. Sec. 371:

"Descent of Land

"For the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of Section 348 of this title, whenever any male and female Indian shall have cohabited together as man and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purposes aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purposes be taken and deemed to be the legitimate issue of the father of such child: . . ."

STATEMENT OF THE CASE

George Chahsenah was a full-blood Comanche Unallottee and lived in and around Apache, Oklahoma, most of his life. He began drinking alcohol, whiskey and wine excessively during the early part of the 1940's and by 1956 was known as an "alcoholic" and an "habitual drunkard." Hardly a day passed that he was not drunk or drinking and this condition continued up until his death on or about October 11, 1963. George Chahsenah was also a diabetic, suffered from cirrhosis of the liver and was in and out of the Indian Hospital at Lawton, Oklahoma, as an alcoholic and diabetic. He was arrested many times in Apache, Lawton and Anadarko and thrown in jail for being drunk.

George Chahsenah never made any effort to work or earn wages during his lifetime but lived principally from the income from the leasing of his restricted lands for oil and gas and agricultural purposes. These funds were usually spent within a few hours or days after he received the money from the Bureau of Indian Affairs, for intoxicants and for personal items, such as food stuff and goods. Often this food and other goods would be traded for intoxicants during periods of temporary financial adversity. In order to purchase intoxicants during such periods, he often obtained money from relatives or other associates, several of whom were named as devisees in his various purported Wills and repaid such loans when funds were subsequently received.

During George Chahsenah's lifetime, he failed to make any appreciable efforts towards discharging his responsibility to his daughter, Dorita High Horse, during her childhood.

George Chahsenah was known as a "Will writer," having made several Wills, the first of which was on November 27, 1956, in favor of a niece, Viola Atewooftakewa (Tate); a second, dated March 19, 1957, in favor of a friend, Sammy Schwartzer; a third, dated May 21, 1959, in favor of a friend, Fred H. Benge; a fourth, in favor of a nephew, Strudwick Tahsequah; a fifth, dated March 6, 1962, in favor of a cousin, Rosa May Wahah Roskah; and the last, dated March 14, 1963, in favor of his niece, Viola Atewooftakewa and her three children. None of these Wills contained a reference to Dorita High Horse, daughter of decedent.

After the judgment and opinion came down by the trial court, the principal beneficiary under the Will, Viola Atewooftakewa (Tate), the niece of George Chahsenah, deceased, died and the case was revived in the name of James Tooahimpah (Tate), no relation to George Chahsenah, but the father of George Chahsenah's grandnieces and grandnephews who were named as beneficiaries in his last purported Will, dated March 14, 1963. Another devisee, Frankie Lee Tooahimpah, is also deceased, and the action is revived in the name of James Tate, his father.

On or about the time that George Chahsenah made his last purported Will of March 14, 1963, he was staying part-time at the home of Viola Atewooftakewa (Tate) in Apache. He was drinking during said entire time that he was in and around his niece and her children.

At the time that George Chahsenah died on October 11, 1963, apparently by virtue of his chronic alcoholism and his illness through diabetes and cirrhosis of the liver, he was in the Indian Hospital at Lawton, Oklahoma. George

Chahsenah was 55 years of age, at the time of his death, a resident of Apache, Oklahoma, having never married and leaving no surviving brothers, sisters or parents. He was survived by several nieces and nephews, most of whom were Appellants on the appeal before the Secretary of Interior and by his daughter, Dorita High Horse, an Appellant before the Secretary of Interior and defendant and Intervenor in the trial court. The paternity of Dorita High Horse had been acknowledged by George Chahsenah during his lifetime on several occasions and caused the Secretary of Interior, acting by and through the Solicitor, to state:

> "Evidence supporting the Examiner's finding of fact that Dorita High Horse is decedent's daughter is virtually uncontradicted in the record and is so convincing that his finding would be sustained on appeal if it had been contested, and it was not."

It will be noted in passing that much of Petitioners' statement of the case is argumentative and inappropriate to that section of their brief. Respondent objects strenuously to the constant characterization of her as being an illegitimate, as she is legitimate by the very terms of Title 23 U.S. 371.

This Statute was applied to Dorita High Horse by the Examiner of Inheritance (App. 71-72) under its Statutes at Large designation of an Act of February 28, 1891, 26 Statute 795.

SUMMARY OF ARGUMENT

In Petitioners' summary of argument reference is made to prior decisions by the Secretary of Interior, in which the Secretary approved Wills that did not achieve or consummate an equitable treatment of the heirs-at-law of the decedent Indian, and specifically mentioned the *Estate of Wook-Kah-Nah*, 65 ID 436, and later affirmed by the Circuit Court of Appeals of the District of Columbia in *Asenap* v. *Huff*, 312 F.2d 358. Counsel for Respondent, Dorita High Horse herein, represented the principal beneficiaries under the Will of Wook-Kah-Nah and defended the contest thereto before the Examiner and before the Secretary of Interior.

Contrary to Petitioners' contention that equitable treatment of the heirs-at-law of the decedent, Wook-Kah-Nah, was not mentioned, it is pointed out that the Protestants to the Wook-Kah-Nah's Will made an issue of this point. However, since there was ample evidence to satisfy the Exa[illegible]ner and the Secretary of the Interior that Wook-Kah-Nah had adequately and equitably taken care of her other children, neither dignified the issue by relying solely on the point for an approval of her Will.

Respondent, Dorita High Horse, the heir of the testator, contends that the action of the Secretary of Interior in disapproving the Will should be sustained by this Court.

It is the Respondent's contention that action taken by the Secretary pursuant to 25 U.S.C. Sec. 373 is not reviewable by the courts. This section should be read together with 25 U.S.C. Sec. 372, dealing with the determination of heirs. When this is done the language in the latter section making action by the Secretary "final" is equally applica-

ble to the Secretary's act in approving or disapproving a Will. The two sections, of necessity, should be read together because they are two halves of a unified Congressional plan to entrust the passage of an Indian's restricted property on that Indian's death to the administrative discretion of the Secretary, rather than to the courts. The legislative history and previous decisions of this Court are consonant with this contention.

Because the Secretary's act is thus final, it falls under 5 U.S.C. Sec. 701(a) which makes the Secretary's act immune to judicial review.

If, however, it should be determined that the Secretary's act is subject to review, the scope of review is limited to determining if the act was within the scope of authority conferred upon him. There is no suggestion that it is beyond the power of the Secretary to disapprove a Will of a restricted Indian as to that Indian's restricted property.

Further, however, if it should be determined that the scope of review is not thus limited, it is suggested that, nevertheless, the Secretary's action should be sustained. His decision has a rational basis. It is not capricious or arbitrary. Under these circumstances a judicial reversal of the Secretary's act would be tantamount to usurpation of discretion bestowed upon Secretary and not on the courts.

Finally, it is submitted that 28 U.S.C. Sec. 1361 is not applicable. It merely extended the jurisdiction over mandamus to the local federal courts. It did not expand the scope of the remedy. Mandamus will lie only to require an official to do a ministerial act or to exercise his discretion. It will not lie to correct action taken by an official which lies within his discretion.

ARGUMENT

I

THE LEGISLATIVE HISTORY AND PREVIOUS DECISIONS OF THIS COURT ARE CONSISTENT WITH THE HOLDING THAT THE SECRETARY'S ACTION IS NOT SUBJECT TO REVIEW BY THE COURTS.

The power of the Secretary to approve or disapprove the Wills of Indians as to restricted property now 25 U.S.C. § 373 came into the law in June 25, 1910, ch. 431, § 2, 36 Stat. 856:

> "Any persons of the age of twenty-one years having any right, title or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however, that no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior.*" (Emphasis ours.)

The Act of February 14, 1913, 37 Stat. 678, as amended, 25 U.S.C. § 373 additionally provides:

> "* * * That *the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator,* and in any case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary is authorized within one year after the death of the testator to can-

cel the approval of the will, *and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located * * *.*" (Emphasis ours.)

In 45 Cong. Rec. 5812 we find recorded this discussion of the above legislation between Mr. Burke, the Chairman of the Indian Affairs Committee of the House and Representative Tilson:

"Mr. Tilson. May I ask the gentleman as to the last provision of section 2, as to when the approval of the Commissioner of Indian Affairs or the Secretary of the Interior is to be given to this will—when it is made—before the testator dies?

Mr. Burke of South Dakota. It would not have any effect if it was not completed in the lifetime of the decedent, I would imagine.

Mr. Tilson. My question goes to this: Could this will, if it were made and the Indian should die, be sent to the Secretary of the Interior to be approved then?

Mr. Burke of South Dakota. Possibly it might. I think perhaps it would be just as well if it could.

Mr. Cox of Indiana. Mr. Chairman, what is the gentleman's opinion as to whether or not the proviso contained in section 2 does not place the complete power of the will in the hands of the Commissioner of Indian Affairs?

Mr. Burke of South Dakota. The Commissioner of Indian Affairs and the Secretary of the Interior, of course, would not favor the provision permitting Indians to make wills unless the making of them were subject to the approval of the department.

Mr. Cox of Indiana. Under the proviso as it now exists in section 2, does it not place complete power in the hands of the Secretary of the Interior and the Commissioner of Indian Affairs over the will of an Indian with absolute power to revoke the Indian's will?

Mr. Burke of South Dakota. I think so.

Mr. Cox of Indiana. Then after all it simply imposes the entire power of making the will in the hands of the Commissioner of Indian Affairs.

Mr. Burke of South Dakota. I will say the purpose was this: It frequently happened—and I will speak of that in connection with sections 3 and 4 at the same time—it frequently happened an Indian has three or four children. He was allotted land at the time he had only two children, and the father and the mother have allotments and the two children who were living at the time allotments were made have allotments, but the other children have no land at all.

Now, the Indian is just as human as a white man, and it frequently happens that he desires to have permission to give his allotment to the children who have no land, and in a case of that kind undoubtedly the Interior Department would O.K. it, whereas if it was a will giving his estate to some person who ought not to have it, then they would disapprove it.

Mr. Cox of Indiana. I suppose the purpose of this proviso is an equitable purpose, reserving in the Department of the Interior the power to compel the Indian to make a proper will—

Mr. Burke of South Dakota. Not compel him at all.

Mr. Cox of Indiana. Or else revoke the will if he did not make a proper will.

Mr. Burke of South Dakota. If the Indian makes a will, and it is not satisfactory to the commissioner and the Secretary, and I put both in to safeguard it, it will be disapproved of, and of course will be of no effect.

Mr. Cox of Indiana. Then, if the will does not meet the approval of the Commissioner of Indian Affairs and the Secretary of the Interior, it gives them power to revoke it.

Mr. Burke of South Dakota. No; it can not be revoked until approved, at least. Section 3 provides that where an Indian has an allotment he may release his allotment and let the land be allotted to his children who are without any land, subject to the approval of the Secretary of the Interior."

Until this legislation was passed a restricted Indian could not make a Will of his restricted property. In speaking of this legislation, admittedly more particularly of § 1 of the Act now 25 U.S.C. § 372, the Supreme Court said:

> "In so doing, it evinces a change of policy, and an opinion that *the rights of Indians can be better preserved by the quasi paternalistic supervision of the general head of Indian Affairs.*" *Hollowell* v. *Commons*, 239 U.S. 506, 508.

Under the provisions of the foregoing Act, a Comanche Indian was granted the right to dispose of his trust property by Will, in accordance with the regulations prescribed by the Secretary of the Interior. It will be noted that under the provisions of the section above quoted that no Will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior. Further, that the Secretary of the Interior may

approve or disapprove the Will either before or after the death of the testator.

The leading case in construing the foregoing Federal Act is *Blanset* v. *Cardin*, 256 U.S. 319 (1921). In said decision, the Supreme Court used the following language beginning at page 326:

> "The act of Congress is careful of conditions. In the first instance it is concerned with testacy; that is, the existence of a will. A will existing, the allotment is disposed of by it. A will not existing—either not execute, or, *if executed, canceled—there is intestacy*, and the state laws of descent and distribution obtain. In the present case, there is a will and it is uncanceled; and, therefore, the contention of appellant is untenable. And it will be observed also by referring to the Act of Congress, powers are invested in the Secretary which preclude interference or control by anybody, or right in anybody to have canceled 'the patent in fee' which is empowered 'to be issued to the devisee or devisees,'—a right appellant asserts in the present case. In a word, the Act of Congress is complete in its control and administration of the allotment and of all that is connected with or made necessary by it, and is antagonistic to any right or interest in the husband of an Indian woman in her allotment under the Oklahoma Code. And we agree with the court of appeals that the Act of Congress was the prompting of prudence to '*afford protection to dependent and natural heirs* against the waste of the estate as the result of an unfortunate marriage, and enforced inheritance by state law.' *And there can be no doubt that the Act was the suggestion of the Interior Department, and its construction is an assistant, if not demonstrative criterion, of the meaning and purpose of the Act.*

"Our conclusion is the same as that of the court of appeals, 'that it was the intention of Congress that this class of Indian should have the right to dispose of property by will under this Act of Congress, free from restrictions on the part of the state as to the portions to be conveyed, or as to the objects of the testator's bounty; *provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior.*' The court added that the conclusion was in accord with the views of the Supreme Court of the State, referring to *Brock* v. *Keifer*, 59 Okla. 5, 157 Pac. 88." (Emphasis ours.)

In light of this legislative history and these previous expressions by this Court, it is submitted that the view, that disapproval of the Will is not subject to judicial review, taken by the Court for the Tenth Circuit is sound.

It is submitted that this history and these decisions also demonstrate the unsoundness of the position taken by the legatees and devisees. They suggest (Petitioners' Brief 20-30) that the Secretary is limited to determining whether the Will was executed with due formalities, whether the Will was free of taint of duress and undue influence, and whether the testator had testimentary capacity. Certainly, this history and the language of the Court set out above demonstrate forcibly that the legislation was not intended to limit the Secretary to serving the same function that a probate court serves in relation to ordinary Wills. If this had been the intent of Congress, it seems unlikely that it would have taken restricted Indian Wills away from the courts where they had been prior to the Act. *Hallowell* v. *Commons*, 239 U.S. 506.

The legatees and devisees of the Will urge strongly the applicability of the presumption against non-reviewability (Petitioners' Brief 41-50).

In answering this argument, counsel for Dorita High Horse can do no better than set out a portion of the opinion of Chief Justice Jameson of the United States District Court for Montana in *Simons* v. *Udall*, 276 F.Supp. 75, 76:

> "Section 1 [25 U.S.C. § 373] relating to ascertainment of the legal heirs of the decedent contains the language 'and his (the Secretary's) decision thereon shall be final and conclusive.' In many cases it has been held that decisions of the Secretary made pursuant to Section 1 are not reviewable. There is a conflict in the authorities as to whether the same finality extends to decisions of the Secretary under section 2 [25 U.S.C. § 373]. In the consideration of these cases, it is important at the outset to recognize the plenary power of Congress over Indians and Indian property. This power was well-summarized in an opinion by Judge Pope in Simmons v. Eagle Seelatsee, E.D.Wash.1965, 244 F. Supp. 808, 813; aff'd without opinion, 384 U.S. 209, 86 S.Ct. 1459, 16 L.Ed.2d 480. The court said in pertinent part:
>
> > 'It is well settled that Congress has plenary control over Indian tribal relations and property and that this power continues after the Indians are made citizens. (citing cases) "After 1871 Congress turned from regulating Indian affairs by treaty to regulation by agreement and legislation. The plenary character of this legislative power over various phases of Indian affairs has been recognized on many occasions." Board of County Com'rs of Creek County v. Seber, 318 U.S. 705, 716, 63 S.Ct. 920, 926, 87 L.Ed. 1094.'
>
> '* * * "Plenary authority over the tribal relations of the Indians has been exercised by Congress from

the beginning and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Lone Wolf v. Hitchcock, 187 U.S. (553) 565. (23 S.Ct. 216, 47 L.Ed. 299)."'

"A leading case on the effect and purpose of the Act of June 25, 1910, is Hallowell v. Commons, 239 U.S. 506, 508, 36 S.Ct. 202, 60 L.Ed. 409, which involved the equitable title of alleged heirs of an Indian allottee dying intestate during the trust period. It was argued that the Act should not apply to pending cases. The language of the Court in answering this contention (although related specifically to section 1 of the Act) is pertinent. The Court said in part:

'* * * This act restored to the Secretary the power that had been taken from him by acts of 1894 [28 Stat. at L. 305, chap. 290] and February 6, 1901, chap. 217, 31 Stat. at L. 760, Comp.Stat. 1913, § 4214. McKay v. Kalyton, 204 U.S. 458, 468, 27 Sup.Ct.Rep. 346, 51 L.Ed. 566, 570. It made his jurisdiction exclusive in terms, it made no exception for pending litigation, but purported to be universal, and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States. * * * But, apart from a question that we have passed whether the plaintiff even attempted to rely upon the statutes giving jurisdiction to the courts in allotment cases, the reference of the matter to the Secretary, unlike the changes with regard to suits upon bonds, takes away no substantive right, but simply changes the tribunal that is to hear the case.'

"There is some conflict in the few cases which have passed upon the reviewability of decisions of the Secretary under section 2 [25 U.S.C. § 373] of the 1910 Act. In the case of Homovich v. Chapman, 1951, 89 U.S.App. D.C. 150, 191 F.2d 761, the court held that review is not precluded by the statute, saying in part:

'* * * We think it plain that, if Congress had meant that the decisions in Section 2 should be final and conclusive, it would have said so; in the immediately preceding paragraph it had so provided when it meant to do so. The mere fact that the acts of the Secretary in providing regulations for the execution of these wills and in approving them, required the exercise of discretion and judgment on his part, does not preclude judicial review of his action. To be sure, if upon such review it appears that his action was within the scope of the authority conferred upon him, the court cannot disturb his decision. But that is a different rule from the rule of total non-reviewability. The Administrative Procedure Act (Section 10) forbids judicial review only where statutes "preclude" such review or where agency action is "by law committed to agency discretion." No statute "precludes" this review, and the Secretary would have us stretch the second prohibitory clause far beyond its meaning. * * *'

"In Hayes v. Seaton, 1959, 106 U.S.App. D.C. 126, 270 F.2d 319, the primary question for determination was whether a father or son died first. If the father died first, the property passed to the son under his will. If the son died first, the father inherited his son's property by intestate succession. The court held the Secretary's determination that the son survived the father was 'final and conclusive' under Section 1 of the 1910 Act [25 U.S.C. § 372], and that there was 'no basis for * * * reliance on § 2' [25 U.S.C. § 373] of the act. In a dissenting opinion, Judge Burger took the position that both Sections 1 and 2 had equal bearing, and that the action of the Secretary was reviewable in view of the holding in Homovich v. Chapman that 'Section 10 of the Administrative Procedure Act governs review of action taken by the Secretary under the authority of Section 2 of the 1910 Act.'

"In the recent case of Heffelman v. Udall, 1967, 10 Cir., 378 F.2d 109, 112, cert. den. Nov. 7, 1967, 389 U.S. 926, 88 S.Ct. 287, 19 L.Ed.2d 278, the Court of Appeals for the Tenth Circuit declined to follow Homovich v. Chapman. On the contrary, the court said that it would be 'illogical and contrary to the whole history of laws governing Indian property' to distinguish between the rights of heirs under section 1 and legatees and devisees under section 2. In that case the will provided that if the deceased remarried, one-third of her estate was to go to her husband. The question determined by the Secretary was whether or not a marriage had taken place. The court said in part:

'* * * Rather, we are urged to hold that the absense or presence of a will is the determinative premise upon which jurisdiction to review the Secretary's finding of a question of fact is dependent. To so hold, we believe, would reduce "the act of Congress [the Act of June 25, 1910] * * * to impotence by its contradictions." Blanset v. Cardin, 256 U.S. 319, 325, 41 S.Ct. 519, 522, 65 L.Ed. 950. Certainly, if Louise Wilson had died intestate, the rejection of appellant's claim to heirship and the Secretary's finding would not be subject to judicial review. Henrietta First Moon v. Starling White Tail, 270 U.S. 243, 46 S.Ct. 246, 70 L.Ed. 565. While there may be legal distinctions to be drawn between the claim of an heir and the claim of a legatee, it would be illogical and contrary to the whole history of laws governing Indian property to ascribe to Congress by way of a negative inference an intention to provide the Secretary of the Interior with unfettered discretion on the one hand but not on the other. We think that as long as an Indian allotment remains subject to the Secretary's control, cf. Hanson v. Hoffman, 10 Cir., 113 F.2d 780, sections 1 and 2 of the Act of 1910 should be viewed as complementing each

other with respect to the finality of the administrative determination of facts. We accordingly conclude that such a determination comes within the jurisdictional exception stated in section 10 of the Administrative Procedure Act.' 378 F.2d 112.

"The reasoning in the Heffelman case is persuasive, particularly in view of the history of the laws governing Indian property. Section 1 [25 U.S.C. § 372] of the 1910 Act provides that when an Indian allottee dies before the expiration of the trust period 'without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior * * * shall ascertain the legal heirs * * * and his decision thereon shall be final and conclusive.' Section 2 [25 U.S.C. § 373] then provides that an allottee over 21 years of age may dispose of his property by will 'in accordance with regulations to be prescribed by the Secretary of the Interior; Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior * * *.'

"Under both sections the Secretary 'in his discretion' is empowered to sell the restricted land and to remove restrictions and issue a fee patent to heirs or devisees. As the court said in Hanson v. Hoffman, supra, 'until the administrative control of the Secretary over the allotments and the trust property has ceased, the courts are without power to interfere with the performance by the Secretary of his Administrative functions with respect thereto.'

"Bearing in mind also the plenary control by Congress over Indian property and that the effect of the 1910 Act, as stated by Mr. Justice Holmes in Hallowell v. Commons, supra, was to restore to the Secretary 'the power that had been taken from him' by prior acts, it is my conclusion that sections 1 and 2 of the 1910 Act should be construed together and that the decision of

the Secretary is not reviewable under either section. This construction is consistent with the apparent intent of Congress to insure marketability of Indian titles.

"This conclusion finds support in the legislative history of the 1910 Act, as indicated by the following excerpt from the proceedings on H.R. 24992:

'Mr. Fitzgerald. Mr. Chairman, I want to call the gentlemen's attention there to section 1, where it provides that the determination of the Secretary of the Interior as to who the heirs of any Indian are is conclusive.

'Mr. Burke of South Dakota. I will say to the gentlemen that that is in the law of 1906 and was put in the law of 1908. It was put in there for this purpose. *It was to settle title, so that its finality could never be questioned* for the purpose of affecting its marketability. It simply leaves any aggrieved person who may be left out in the distribution of an estate a claim to go to Congress, instead of assailing the title.

'Mr. Fitzgerald. Would it not be better to give some remedy in the court; have a court determine as to who the heirs of any Indian might be?

'Mr. Burke of South Dakota. My observation has caused me to believe that it is not a desirable method of determining titles * * *.' 45 Cong.Rec. 5811-12 (May 4, 1910). Emphasis added.

"I am not unmindful of the provision of the Administrative Procedures Act, 5 U.S.C. § 702, that '[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute' is entitled to judicial review, 'except to the extent that—(1) statutes preclude judicial review; or (2) agency action is

> by law committed to agency discretion.' 5 U.S.C. § 701(a) (recodified in Pub.Law 89-554, 80 Stat. 378). It is now well-settled that 'judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' Abbott Laboratories v. Gardner, 1967, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681." [Footnotes omitted.]

Subsequent to this opinion by Justice Jameson, the Tenth Circuit decided *Attocknie* v. *Udall*, 390 F.2d 636, *cert. denied* 393 U.S. 833, relying on the *Heffleman* case, *supra*, and its theory that Sections 1 and 2 of the Act of 1910, 25 U.S.C. Sections 372 and 373 were to be read as complementing each other.

Section 10 of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. Sec. 1009, confers the right of review "Except so far as * * * (2) agency action is by law committed to agency discretion."

The action of the Secretary of Interior in approving a Will obviously involves discretion. Sec. 2 of the Act of June 25, 1910, as amended by the Act of February 14, 1913, 37 Stat. 678, 25 U.S.C. Sec. 373, after providing that no Will shall be valid unless and until it has been approved by the Secretary, gives wide powers to that officer (a) to approve or disapprove a Will before or after death, (b) to revoke an approval for fraud, (c) to continue to administer the trust, even after death and approval of the Will, (d) in that event to cause the lands to be sold and the money used, as necessary, for the heirs, or (e) remove the restrictions, or (f) cause a patent in fee to be issued to the devisees, or (g) pay the moneys to the legatees "in whole or in part from time

to time *as he may deem advisable*, or use it for their benefit." (Italics ours.)

The mere enumeration of these alternative powers shows they are discretionary; no rules chart the Secretary's course; no Congressional plan ties his hands; he decides according to his own good sense. Sec. 2 even gives him power to make regulations, which imports discretion.

II

EVEN IF THE SECRETARY'S ACTION IS SUBJECT TO JUDICIAL REVIEW, THE SCOPE OF THAT REVIEW IS LIMITED TO THE DETERMINATION BY THE COURTS AS TO WHETHER THAT ACTION IS WITHIN THE SCOPE OF THE AUTHORITY CONFERRED UPON HIM.

The devisees and legatees rely strongly on *Homovich* v. *Chapman*, 191 F.2d 761, in which counsel for Dorita High Horse represented the legatees and devisees under the Homovich Will. Therein the Court of Appeals for the District of Columbia said:

> "To be sure, *if upon such review it appears that his action was within the scope of the authority conferred upon him, the Court cannot disturb his decision.* But that is a different rule from the rule of total 'non-reviewability.'" *Id.* at 764. (Emphasis ours.)

What is the scope of the power conferred on the Secretary? A reading of the statute, 25 U.S.C. Sec. 373 will demonstrate that he was authorized to make regulations concerning the Wills by which restricted Indians might dispose of their property. Then in a proviso, he is delegated the authority to approve Wills. It is submitted that this authority transcends the power to check the Will for com-

pliance with the formalities prescribed by the regulations. The proviso says, "no will so executed," *i.e.*, in compliance with the regulations adopted, "shall be valid or have any force or effect unless it shall have been approved by the Secretary."

No one has suggested any reason why the action of the Secretary should be viewed as being outside the scope of the power granted to the Secretary. It is admitted that the Indian and property involved are restricted. There is no suggestion that the period of restriction has expired. How, then, does the action of the Secretary in disapproving the Will exceed the scope of his authority?

III

REGARDLESS OF THE DECISION AS TO REVIEWABILITY, AND THE LIMITED DEGREE OF REVIEW SUGGESTED ABOVE IN II, NEVERTHELESS THE ACTION OF THE SECRETARY MUST BE SUSTAINED BY THIS COURT BECAUSE THE DECISION OF THE SECRETARY WAS NOT CAPRICIOUS OR ARBITRARY, BUT HAD A RATIONAL BASIS. UNDER THESE CIRCUMSTANCES, THE SUBSTITUTION BY A COURT OF ITS JUDGMENT FOR THAT OF THE SECRETARY WOULD BE A USURPATION OF THE CONGRESSIONAL DELEGATION OF DISCRETION TO THE SECRETARY.

The basic principle inhibiting a court's arrogation of agency action to itself was postulated by Justice Cardozo in *A., T. & T. Co.* v. *United States,* 299 U.S. 232, 236-237 (1936):

> *"This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers.* To show that these have been exceeded in the field of

> action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. * * *"

In other words, where Congress has delegated discretionary authority to the Secretary of Interior to approve or disapprove Wills of Indians, the substitution of judgment by the court for that of the Secretary is in derogation of the Congressional delegation and is an impermissible usurpation of administrative power. *Cf. Decatur* v. *Paulding*, 14 Pet. 497, 515-517 (1840); *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943); *id.* 332 U.S. 194, 207-209 (1947); *Gray* v. *Powell*, 314 U.S. 402, 411-413 (1941); *Federal Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145-146 (1940); *Crolley* v. *Tatton*, 249 F.2d 908, 911-912 (C.A. 5, 1957), *cert. den.* 356 U.S. 966.

So, here, it is the Secretary's judgment, not that of the courts, whether to approve or disapprove the purported Last Will and Testament of George Chahsenah, deceased, Comanche Unallottee, on which Congress placed its reliance.

It is a cardinal rule of administrative law that administrative action, such as that of the Secretary in the instant case, should not be disturbed by the courts "'when there is found to be a rational basis for the conclusions approved by the administrative body.'" *Hayes* v. *Seaton*, 270 F.2d 319, 321 (D.C. Cir. 1959). It was not the function of the courts to decide whether it would have reached a different conclusion under the facts of this case than was reached by the Secretary, but whether the Secretary's determination was a reasonable one.

The decision of the Secretary to disapprove the Will does have a rational basis.

The test employed by the Regional Solicitor acting for the Secretary in determining whether to approve or disapprove the Will was:

> "The appropriate action to be taken in approving or disapproving the purported will is the action which would most nearly achieve just and equitable treatment of the beneficiaries thereunder and the decedent's heirs-at-law."

It is submitted that this test is in keeping with the legislation which conferred power upon restricted Indians to devise their restricted property.

It should be recalled that this Court said of the legislation under examination that "(I)t evinces a change of policy that the rights of Indians can be better preserved by the quasi paternalistic supervision of the general head of the Indian Affairs." *Hallowell* v. *Commons*, 239 U.S. 506, 508.

Further, the facts of the case are such that measured by this test, the disapproval of the Will was rational. The Regional Solicitor speaking for the Secretary in refusing to approve the Will said:

> "Since the record contains sufficient evidence of the relationship between the decedent and his heir-at-law and his devisees to ascertain whether approval of the will by the Hearing Examiner was an appropriate discharge of the Secretary's responsibility, consideration of the circumstances surrounding these persons will be given at this appellate level.

"The decedent was the natural father of Dorita High Horse. The record reflects that during his lifetime the decedent's only contribution toward the welfare of his daughter was to participate in her conception, to acknowledge her status as his daughter, and to visit briefly with her on rare occasions when they would by accident meet on public streets. Before the daughter's birth, he abandoned the mother, with whom he had been living. Although marriage to the mother was not impeded by any existing or subsequent marriage to another woman, the decedent neglected to remain and maintain a home with the mother in order that the daughter would have the advantages of a normal home life during her childhood. Notwithstanding the fact that the decedent received income from his restricted lands, he made no contribution toward the support or education of his daughter, leaving her to be supported by her mother, until she died when the daughter was six years old, and thereafter by a maternal aunt. The decedent's legal responsibility for the support of his daughter during her childhood could have been enforced by judicial action on her behalf to the extent, if any, that he had unrestricted income or assets, and the Secretary or his authorized representative probably would have honored reasonable requests on the daughter's behalf for contributions toward her support from the decedent's income from restricted lands. However, no action toward that end was taken by the decedent, by his daughter, or by others on her behalf.

"If the decedent had died several years earlier leaving an orphaned minor daughter being raised by an aunt, any will disinheriting the daughter would be subject to disapproval because the estate would be needed for discharging his responsibility for supporting the child. The fact that the daughter had attained majority and married prior to the death of the decedent does not alter the fact that the decedent had an obli-

gation to his daughter which was not discharged either during his lifetime or under the terms of his purported will. For this reason it is inappropriate that the Secretary perpetuate this utter disregard for the daughter's welfare by lending his approval to the decedent's will.

"This decedent failed to make any appreciable effort toward discharging his responsibilities to his daughter during her childhood, and upon her attaining adulthood he attempted by will to devise and bequeath to others such of his restricted assets as had not been dissipated. This he could do only if he possessed unrestricted power of testamentary disposition. His attempt to do so, however, was limited by the fact that the Secretary must exercise the discretionary responsibility of approving the will before it can become effective. Although the Examiner approved the will, this appeal from that approval requires the appellate authority to determine whether such approval was a reasonable exercise of the discretionary responsibility of the Secretary.

"I hereby determine, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2a(3) (a), 24 F.R. 1348) and redelegated to the Regional Solicitor (Solicitor's Regulation 23, 31 F.R. 4631), that under the circumstances hereinbefore set forth the Secretary's approval of the purported will dated March 14, 1963, should not be given, the Examiner's approval is rescinded, and the will is hereby disapproved" (App. 85-87).

Viola Atewooftakewa (Tate), the niece and principal beneficiary of George Chahsenah, has died since the disapproval of the Will, leaving grandnieces and grandnephews and their father, who is of no relation to Chahsenah. When the equity of their claim is weighed against that of the daughter, Dorita High Horse, the wisdom of

Congress giving discretion to the Secretary to approve or disapprove Wills of restricted Indians is readily apparent. Without this power, the restricted property would have passed to distant relatives and even one who was totally unrelated by blood. In some cases it might even pass to persons completely devoid of Indian blood. This is the very reason that Congress placed Indian Wills of restricted property under the paternalistic supervision and discretionary control of the Secretary of Interior.

It is, therefore, submitted that even if the Secretary's act is subject to judicial review in the ordinary sense and scope of review of administrative action, still his disapproval of the Will ought to be sustained.

IV

THERE IS NO MERIT IN THE ARGUMENT THAT 28 U.S.C. SEC. 1361, WHICH AUTHORIZES LOCAL FEDERAL DISTRICT COURTS TO ENTERTAIN SUITS FOR MANDAMUS AGAINST FEDERAL OFFICIALS, CONFERRED JURISDICTION ON THE DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA TO OVERTURN THE SECRETARY'S ACTION.

Title 28 U.S.C. Sec. 1361 does not increase the scope of the remedy of mandamus. Before the action will lie the duty must be ministerial or not discretionary and so plainly prescribed as to be free of doubt. *Prairie Band of Pottawatomie Tribe of Indians* v. *Udall*, 355 F.2d 364, *cert. denied* 385 U.S. 831; *Seeback* v. *Cullen*, 224 F.Supp. 15, *aff'd* 338 F.2d 663, *cert. denied* 380 U.S. 972; *Rural Electrification Administration* v. *Northern States Power Co.*, 373 F.2d 686, *cert. denied* 387 U.S. 945; *Armstrong* v. *U. S.*, 223 F.Supp. 188, *aff'd* 354 F.2d 648, *cert. denied* 384 U.S. 946.

CONCLUSIONS

For the foregoing reasons, it is respectfully requested that this Court affirm the judgment of the Court of Appeals for the Tenth Circuit which vacated the order of the trial court and remanded the case to the trial court for dismissal. It is further requested that this case be remanded to the Secretary of Interior with instructions to him to distribute the Estate of George Chahsenah, deceased, Comanche Unallottee, to Dorita High Horse as his sole heir.

Respectfully submitted,

HOUSTON BUS HILL
1376 First National Building
Oklahoma City, Oklahoma 73102
Counsel for Respondent, Dorita High Horse

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